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No. 87-470

In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

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QUESTIONS PRESENTED

1. Is Indiana's civil RICO statute, authorizing pre-trial padlocking and post-trial forfeiture of entire communicative businesses solely on the basis of two or more obscenity offenses, facially unconstitutional under the First Amendment as a prior restraint on protected expression?

2. Do the forfeiture, padlocking and other sanctions of Indiana's civil RICO statute constitute an overly broad means of regulating the dissemination of obscenity in that they permanently restrain in the most sweeping fashion the prospective exercise of First Amendment rights?

3. Even in their operation upon materials alleged to be obscene, do the Indiana civil RICO statute's pre-trial sanctions of mass seizure and padlocking lack sufficient First Amendment procedural safeguards where they can be imposed based solely upon an *ex parte* probable cause determination of obscenity?

4. Do seizure, padlocking and forfeiture sanctions such as those upheld by the Indiana Supreme Court, violate the First Amendment by unduly chilling the exercise of protected expression?

LIST OF PARTIES

The following is a list of all parties of record in the Indiana Supreme Court in No. 87-470 in addition to those appearing in the caption of the present petition:

CINEMA BLUE OF FORT WAYNE, INC., EROTICA HOUSE BOOKSTORE, INC., 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK appeared as appellants in the Indiana Supreme Court.

STEPHEN M. SIMS, Prosecuting Attorney for the 38th Judicial Circuit, and STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit, appeared as appellees in the Indiana Supreme Court.

As previously indicated by letter to the Clerk of this Court, petitioner FORT WAYNE BOOKS, INC. believes that 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, CINEMA BLUE OF FORT WAYNE, INC., and EROTICA HOUSE BOOKSTORE, INC. have no interest in the outcome of this petition. Accordingly, pursuant to Supreme Court Rule 19.6, petitioner believes the respondents before this Court to be:

THE STATE OF INDIANA
STEPHEN M. SIMS
STEPHEN GOLDSMITH
PLAZA ENTERTAINMENT CENTER
BURTON GORELICK

* There are no entities to list pursuant to this Court's Rule 28.1.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported as *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind.

1987) and is printed at Cert. App.[1] 1-22; the order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987) and are printed at Cert. App. 104-112. The opinion of the Indiana Court of Appeals is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985) and is printed at Cert. App. 28-98.

JURISDICTION

The Supreme Court of Indiana entered its opinion in this matter on March 2, 1987 and denied rehearing on June 18, 1987. The certiorari petition herein was filed within 90 days of the latter date.

The Indiana Supreme Court's opinion constitutes a final judgment in a civil case upholding the constitutionality of various pre-trial restraints on constitutionally protected expression imposed pursuant to Indiana's state RICO law. The opinion also upheld against constitutional attack the post-trial forfeiture sanctions authorized by that same law. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 2101(c).

[1] As used herein, the abbreviation "Cert. App." will refer to the Appendix to Petition for a Writ of Certiorari filed separately but contemporaneously with the Petition for Writ of Certiorari. The abbreviation "App." will refer to the appendices to this brief. The abbreviation "J.A." will refer to the Joint Appendix. The abbreviation "F.W.R." will refer to the separate trial court record prepared in the Fort Wayne litigation (*Sims, et al. v. Fort Wayne Books, et al.*). The abbreviation "I.R." will refer to the trial court record in the consolidated case from Indianapolis (*Goldsmith v. 4447 Corp., et al.*).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Amendment 14, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

PROVISIONS FROM INDIANA CODE

The pertinent provisions of the Indiana Code are presented in Appendix F accompanying the certiorari petition (Cert. App. 113-125), including: IC §§ 34-4-30.5-1 through 34-4-30.5-6 (Indiana's civil RICO statute—Cert. App. 113-118); §§ 35-45-6-1 and 35-45-6-2 (Indiana's criminal RICO statute—Cert. App. 118-120); and §§ 35-49-1-1 through 35-49-1-10, § 35-49-2-1, and §§ 35-49-3-1 through 35-49-3-4 (Indiana's criminal provisions defining and punishing obscenity violations—Cert. App. 120-125). The civil and criminal RICO statutes are also reproduced in Appendix A of this Brief (App. 1-8).

STATEMENT OF THE CASE

Introduction

This case involves the question whether the seizure, padlocking and forfeiture sanctions authorized by a state's RICO statutes are constitutionally permissible as applied to those whose only alleged offenses involve the sale or exhibition of two or more allegedly obscene items.

A single judgment was rendered below by the Indiana Supreme Court in two cases consolidated on appeal, one involving a civil RICO action against three adult bookstores in Indianapolis[2] and one involving a civil RICO action against three adult bookstores in Fort Wayne.[3] The only petitioner before this Court is Fort Wayne Books, Inc., the owner of one of the three bookstores in the Fort Wayne litigation.

Facts

Petitioner Fort Wayne Books, Inc. operates Fort Wayne Books, an adult bookstore in Indiana. From approximately April of 1979 to March 19, 1984, petitioner's bookstore offered for sale thousands of different sexually-oriented books, magazines, motion picture films and videotapes, all presumptively entitled to constitutional protection. The store also operated numerous motion picture viewing booths wherein a customer could privately view any of a number of different motion picture films or videotapes.

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2 *Goldsmith v. 4447 Corporation, et al.*, Marion County Cir. Ct. #83-1788 (Hamilton County Cir. Ct. #83-346 after change of venue).

3 *Sims, et al. v. Fort Wayne Books, Inc., et al.*, Allen County Cir. Ct. #84-446.

On March 19, 1984, respondents Stephen M. Sims and the State of Indiana filed a complaint (J.A. 7-49) against petitioner and others in the Circuit Court of Allen County, Indiana, charging them with violation of Indiana's state civil RICO statute (IC § 34-4-30.5-1 *et seq.*) and seeking the full range of statutory sanctions including license revocation, corporate dissolution, and forfeiture not only of all of petitioner's assets, but also of assets not owned by the corporation (such as rented realty) used in alleged violation of the statute. (J.A. 46-49.) The only predicate offenses asserted in support of the civil RICO claim were alleged violations of Indiana's obscenity statutes.

On that same date, these respondents filed a "Verified Petition for Seizure of Property Subject to Forfeiture" against petitioner and the other defendants, seeking an *ex parte* order authorizing respondents to padlock petitioner's bookstore and two other bookstores and to seize all of their inventory, equipment and corporate assets. (J.A. 51-78.) This petition was supported by a police officer's probable cause affidavits alleging that the corporate owners of these bookstores were part of a single "enterprise" and that they and their employees had been convicted of certain obscenity offenses[4] which, according to the

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4 The officer's affidavit and supporting exhibits showed convictions of petitioner Fort Wayne Books, Inc. in three cases brought under the former obscenity statute (§ IC 35-10.1-2) and seven of employees under that same former statute, most of which were the result of negotiated pleas. The officer's affidavit alleged no convictions of the corporation under the new obscenity statute (the only one made punishable as a predicate RICO offense) but alleged two cases involving employees who entered into negotiated pleas under the new obscenity statute.

(Continued on following page)

officer, constituted valid "predicate offenses" triggering application of the RICO statute.[5] The officer also alleged that he had personally viewed a number of motion picture films and videotapes exhibited in petitioner's store and had concluded that they were legally obscene. The officer made similar allegations as to the other two bookstores named in the complaint.

The same day, March 19, 1984, an *ex parte* hearing was held on the state's forfeiture petition (F.W.R. 285-317) without any notice of the hearing to the defendants.

Following the *ex parte* hearing, the trial court immediately concluded that there was probable cause to believe that each of the defendants had committed two or more violations of the state's obscenity laws in violation of the civil RICO statute. Accordingly, the trial court, without any notice to petitioner or the other affected businesses, issued an order commanding the immediate padlocking of

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(Continued from previous page)

See F.W.R. 43 and 45. It is not clear from the exhibits attached in support of the officer's affidavit that the conduct in the latter two cases occurred at petitioner's bookstore. *See* F.W.R. 96, 98, 164 and 166 (listing a different street address and different store name as the source of the conduct which resulted in the negotiated pleas). Moreover, the two cases involving convictions under the current obscenity statute involved only conduct which occurred *before* the 1983 amendment to the RICO statute making violations of the new obscenity statute a predicate RICO offense.

[5] Petitioner does not agree that *any* of the convictions alleged in the officer's affidavit constitute valid predicate offenses under Indiana's RICO statute. However, resolution of this issue will involve complicated issues of statutory construction not here relevant. Of course, since the seizure application was made *ex parte*, there was no opportunity for petitioner to force the state to prove that the requisite predicate offenses had in fact been committed.

all three bookstores and seizure of their entire contents. (J.A. 79-83.) The items alleged to be obscene comprised only a tiny fraction of the items actually seized.

On that same day (March 19, 1984), the authorities padlocked all three bookstores and denied access to them by store employees and the public alike. No trial date was set, nor has one ever been set in this case.

On March 23, 1984, petitioner filed a motion in the trial court to vacate the *ex parte* seizure and padlocking order (F.W.R. 327-334), asserting that the *ex parte* order lacked the numerous procedural safeguards required by the First Amendment and also, in any event, was an unconstitutional prior restraint of First Amendment rights.[6] On March 29, 1984, a hearing was held on petitioner's motion to vacate the *ex parte* order and the court denied the motion.[7] (F.W.R. 524.)

The following day, after the bookstores had already been padlocked, the authorities, again without notice, commenced removal of the entire contents of the three establishments, including tens of thousands of books, magazines and films, as well as items such as film projectors, cash registers and bookracks. (See Cert. App. 36 and F.W.R. 548.) As mentioned above, the sole basis for these mass seizures was the allegation of prior obscenity offenses. No judicial determination of obscenity or even probable obscenity of the seized media preceded its confiscation, nor was either alleged.

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[6] An extensive Memorandum of Points and Authorities in support of the motion to vacate appears at F.W.R. 425-468 and additional exhibits thereto appear at F.W.R. 335-416.

[7] A transcript of this hearing is reproduced at F.W.R. 478-529.

On April 3, 1984 the defendants filed an Emergency Motion for Inventory of Property Removed and/or for Return of Property. (F.W.R. 548-551.) The next day, partial inventories were filed by the state (F.W.R. 626-635) and the motion was denied by the trial court (F.W.R. 625).

On April 3 and April 12, 1984, the defendants filed with the trial court a petition and a supplemental petition to certify its interim orders for interlocutory appeal (F.W.R. 552 and 650). On April 18, 1984 the trial court granted the request for certification (F.W.R. 697 and 700) but denied a motion to stay its interim injunctive order pending the interlocutory appeal. (F.W.R. 697 and 701.)

On April 27, 1984, the corporate defendants, including petitioner, perfected their interlocutory appeal and simultaneously filed in the Indiana Court of Appeals an emergency stay application, designated as Motion For Stay (Modification) Of Interlocutory Injunction Without Bond Pending Appeal. The stay application asserted, *inter alia*, that under *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a stay pending appeal was mandatory because state law did not provide for immediate appellate review of the interim *ex parte* closure order. Petitioner's other substantive and procedural challenges were presented in the stay application as well as in its briefs filed on the merits of the interlocutory appeal.

Despite repeated written and oral requests by petitioner and the other appellants for immediate consideration of their stay application pending the interlocutory

appeal,[8] there had still been no appellate ruling on the stay application as of March 26, 1985, nearly a full year after it was filed in the Court of Appeals. Throughout that time, all three bookstores remained sealed and padlocked by virtue of the trial court's unreviewed *ex parte* closure order.

On March 26, 1985, petitioner and the other bookstore owners filed an application to Circuit Justice Stevens of

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[8] On May 2, 1984, five days after petitioner filed its application for stay in the Court of Appeals, respondent Sims filed a Verified Petition For Transfer Of Case to the Supreme Court of Indiana. Under Indiana law, the immediate effect of the filing of such a petition is to divest the Court of Appeals of jurisdiction over both the stay application and the merits of the interlocutory appeal. This procedural device placed the issues relevant to the stay squarely before the Supreme Court of Indiana. Nonetheless, after nearly three months, the Indiana Supreme Court denied the petition for transfer on July 17, 1984 and expressly remanded the stay application back to the Court of Appeals without any decision.

Following the July 17th remand, petitioner expected a prompt consideration of its stay application because, on the same day the Petition For Transfer was filed (May 2, 1984), the Court of Appeals transferred the Fort Wayne case to the division of the Court of Appeals which had issued a similar stay in the Indianapolis case. When no action had yet been taken by the Court of Appeals on the stay application by September 23, 1984, petitioner filed another document in the Court of Appeals entitled "Request For Expeditious Ruling On Motion For Stay (Modification) . . . ." Respondent Sims filed papers on October 10, 1984 urging the Court to defer action on the stay request pending ultimate resolution of the appeal.

In addition to the foregoing efforts of petitioner to secure appellate consideration of its stay application, its counsel also made repeated calls to the Clerk of the Court of Appeals and its Commissioner advising them of the need for prompt consideration of the stay application. Based on those calls, counsel for petitioner were continually, but erroneously, led to believe that action on the stay application was, in all likelihood, imminent.

this Court for a stay of the *ex parte* interim injunctive order.[9] Justice Stevens ordered the State to respond to petitioner's stay application by April 4, 1985.

On April 4, 1985, the Indiana Court of Appeals granted the year-old stay application, rendering moot the application presented to Justice Stevens. Thereafter the padlocks were removed and the three bookstores were allowed to resume operations pending the outcome of the appeal.

Petitioner's case was consolidated in the Indiana Court of Appeals with a similar state RICO action filed against an unrelated alleged "enterprise" consisting of three bookstores in Indianapolis.[10] The primary differences between the two cases are: (1) in the Indianapolis case there were no allegations of *any* obscenity *convictions*. Rather, that RICO complaint was based exclusively upon probable cause allegations of current obscenity violations at two of the three stores (Cert. App. 7-8); (2) in the Indianapolis case, one of the three stores had not yet opened at the time the court issued its *ex parte* order and there was no allegation that its premises had ever been used to violate *any* obscenity law; (3) the unopened Indianapolis store was ordered padlocked and sealed simply upon the allegation that other stores allegedly owned by the same "enterprise" were believed to be violating the obscenity law; (4) the state enjoined the landlord of the yet-to-open Indianapolis store from reletting the padlocked premises to unrelated new tenants (see Amicus Brief of Burke

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[9] *Wayne Books, et al. v. Indiana, et al.*, U.S. Sup.Ct. D[illegible] A-734.

[10] *Goldsmith v. 4447 Corporation, et al., supra.*

Mendenhall, filed in support of Petition for Writ of Certiorari); (5) while the Fort Wayne facts illustrate extreme delay in judicial review at the appellate level, the Indianapolis case involved extreme delay in judicial review of the *ex parte* padlocking order at the trial court level.[11]

On June 12, 1985, the Indiana Court of Appeals issued a 2-1 decision on the consolidated interlocutory appeal. (Cert. App. 29-98.) Initially the Court summarized the problem as follows:

> "Without so much as an allegation of obscenity as to most of the bookstores' inventories of films and publications, the state ultimately seeks permanent revocation of their business licenses as well as forfeitures of these communicative materials and instrumentalities. The impact of such remedies upon the availability of these materials is direct and undeniable—the state has effectively suppressed them prior to distribution. The suppression of entire bookstores inevitably affects protected as well as any unprotected expression . . . ." (Cert. App. 43-44.)

Relying on extensive state and federal precedent, the Court of Appeals found both the pre-trial sanctions of seizure and padlocking and the various post-trial sanctions of forfeiture, license revocation, etc., to be facially unconstitutional as impermissible prior restraints on the distribution of materials not even alleged to be obscene. (Cert. App. 44-58.) The court demonstrated that the statute violates a wide variety of procedural safeguards required by this Court's prior decisions "even if the statutes' application were limited to materials alleged to be

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[11] The procedural facts of the Indianapolis case are set forth chronologically at J.A. 100-102.

obscene." (Cert. App. 64.) Among other things, the Court of Appeals observed:

> "First, the statutory scheme assigns the state no burden of proof regarding obscenity, beyond the requirement that plaintiffs adduce two predicate offenses. Far from requiring that the state affirmatively demonstrate the obscenity of all materials subject to seizure and forfeiture, *the RICO/CRRA statutes do not even permit the defendants to litigate the issue* and to establish the nonobscenity of most of the seized books, films, and magazines." (Emphasis added.) (Cert. App. 67.)

The Court of Appeals concluded that the statute could not be saved by a narrowing construction restricting forfeiture to materials actually proved obscene. The court concluded that the statutes' lack of procedural safeguards prevented such a limiting construction, and in any event, such a construction "would be an unnecessarily tortuous exercise" which would be "anomalous in relation to the overall operation of the RICO/CRRA statutes" and "would add nothing to the prosecutorial tools now afforded by our criminal obscenity statute." (Cert. App. 69.) The Court of Appeals stated that it would "not ascribe to the legislative intent such an absurd result." (Cert. App. 69.)

The Indiana Supreme Court reversed the decision of the Court of Appeals. (Cert. App. 1-22.) In a split opinion, the majority concluded that a statute authorizing sanctions against protected expression need not be measured by First Amendment standards if the legislative purpose was non-censorial. (Cert. App. 13-15.) Concluding that the statutory purpose for including obscenity as a predicate RICO offense was unrelated to a desire to suppress speech, the court held that the Court of Appeals had erred in subjecting the statute to First Amendment prior restraint analysis. Dissenting, Justice DeBruler disagreed with the underlying premise of the majority opinion, choosing to rely instead on this Court's holding most recently articulated in *Schad v. Burough of Mt. Ephraim*, 452 U.S. 61, 68 (1981),) that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised [by the state]."

The majority also rendered two significant constructions of the statute. First, it held that the state need not allege *any* prior obscenity convictions but need only make probable cause allegations of unproved obscenity violations. (Cert. App. 15-16.) Second, in upholding the Indianapolis order sealing the one location which had never been open, the court necessarily construed the statute so that two or more obscenity violations at any store in a chain of stores justifies closure orders directed to any or all of the stores in the chain.

Finally, the majority opinion rejected petitioner's claim that the *ex parte* seizure and padlocking procedures authorized by the statute lacked adequate procedural safeguards required by the First Amendment. (Cert. App. 17-19.) The majority entirely ignored petitioner's contention that mass seizures of media materials can never be conducted on the basis of *ex parte* probable cause determinations.

The court's opinion addressed only one of petitioner's procedural arguments—the contention that the interim

restraints are void because they are of indefinite duration and that the statutory scheme fails to require a final trial court determination of obscenity within a *fixed* or *specified* brief period. The court noted that the statute does not require trial to be set within any specified period of time after execution of the seizure order. However, rather than reading into the statute a specific time limit for bringing the case to trial, the court construed the statute merely to require trial "within a 'reasonable' time." (Cert. App. 18.)

The three bookstores involved in the Indianapolis litigation have ceased doing business as have all of the Fort Wayne bookstores except for petitioner, Fort Wayne Books, Inc. However, the Indianapolis case is still pending as the authorities continue to seek a final order of forfeiture against the landlord of the abated bookstore. (His premises have remained closed under court order since they were vacated by his former tenants, respondents Gorelick and Plaza Entertainment Center.)

There has been no trial in the present Fort Wayne action nor has a trial date been set.

Petitioner's store has been allowed to remain open pending the outcome of this Court's decision. If the state's actions are upheld, petitioner's store will be padlocked again pending trial.

SUMMARY OF ARGUMENT

The Indiana civil RICO statute as applied in this case represents a stark challenge to the security of First Amendment freedoms and an affront to virtually every fundamental principle of First Amendment jurisprudence since *Near v. Minnesota,* 283 U.S. 697 (1931). Solely for alleged obscenity offenses, the state padlocked three bookstores for more than a year and seized property including entire inventories of presumptively-protected materials. As the Indiana Court of Appeals concluded in facially invalidating the statute, this case "vividly illustrates the rationale for longstanding hostility to any system of prior restraints under our Constitution." *4447 Corporation v. Goldsmith,* 479 N.E.2d 578, 592 (Ind. App. 1985).

In its opinion upholding both the devastating pretrial and post-trial civil RICO sanctions, the Indiana Supreme Court rejected the Court of Appeals' conclusion that the entire statutory scheme violates the First Amendment as a prior restraint. The Supreme Court held that the post-trial forfeiture sanctions are immune from First Amendment challenge as a prior restraint because there was no proof of a censorious legislative purpose (Cert. App. 10-15), flatly contradicting the recent unanimous position of this Court in *Arcara v. Cloud Books, Inc.,* — U.S. —, 106 S.Ct. 3172, 3177 (1986), that the usual strict scrutiny of the First Amendment applies "where it was con-

duct with a significant expressive element that drew the legal remedy in the first place." A majority of this Court, as represented by Justice O'Connor's concurring opinion, indicated that in contrast to the state action upheld in *Arcara* (the closure of a bookstore predicated upon completely non-expressive conduct), a different result would obtain in this case. The use of a nuisance statute (or simply to apply a different label, a "racketeering" statute) "as a pretext for closing down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review," *i.e.*, the extremely strict scrutiny of the prior restraint doctrine. 106 S.Ct. at 3178 (Justice O'Connor, concurring).

This Court has continually reaffirmed that resort to talismanic labels in no way avoids the strictures of the constitutional guarantees of free speech and press. *See New York Times v. Sullivan*, 376 U.S. 254, 268 (1964). Whether the State labels an obscenity offense a "nuisance" or "racketeering," the same First Amendment principles prohibit the closure or forfeiture of an entire communicative business solely on grounds of unprotected expression. Indeed, if these sanctions were upheld in their application to obscenity, no principled distinction would bar the inclusion of other unprotected speech (*e.g.*, defamation, false advertising, etc.) as a predicate offense triggering RICO or similar prior restraint sanctions.

Concluding that this application of the RICO statute did not constitute a prior restraint, the Indiana Supreme Court also rejected the notion that the pre-trial seizure and padlocking already imposed in this case violated numerous procedural safeguards required by a host of this Court's prior decisions. However, because the Indiana Supreme Court's opinion has now squarely held that the post-trial forfeiture sanctions are impervious to First Amendment attack, this case cannot be resolved by addressing only the pre-trial procedural issues. If left undisturbed by this Court, the ruling below will have an immediate and devastating impact, not only in Indiana but nationwide, curtailing public access to an entire genre of constitutionally-protected, non-obscene erotic expression. Accordingly, it is imperative that this Court consider the prior restraint aspects of both the pre-trial and post-trial statutory sanctions.

The Indiana Supreme Court's rejection of the prior restraint argument was not only inconsistent with the standard of review mandated by *Arcara*, *supra*, and many other similar cases, it also was entirely inconsistent with this Court's landmark decision in *Near v. Minnesota*, *supra*, and numerous subsequent cases involving obscenity regulations this Court has found to be impermissible prior restraints.

In essence, the court approved a statutory scheme which provides that a state may restrain all future ex-

pression by a bookstore or other communicative enterprise because of two prior speech-related violations. *Near* held that just such a broad restraint of future expression premised upon prior speech violations "is of the essence of censorship." 283 U.S. at 713.

The opinion below also contravenes numerous post-*Near* decisions by this Court striking down overbroad means of regulating obscenity. These include *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). All of these cases were premised upon the fundamental belief that measures designed to eliminate obscenity should not be so sweeping as to restrain the dissemination of protected speech at the same location; yet this is precisely what Indiana's civil RICO statute is designed to accomplish.

The court's opinion is also inconsistent with more than 40 opinions of state and lower federal courts which have found state laws authorizing license revocation or padlocking of premises where prior obscenity violations have occurred to be impermissible prior restraints. All of those decisions explicitly or implicitly rejected the notion that such broad restraints of future presumptively-protected speech can be constitutionally permissible forms of punishment for past speech violations.

For all the reasons above, both the pre-trial and post-trial sanctions authorized by this statute should be found facially invalid for overbreadth and as impermissible prior restraints. Further underscoring the statutory scheme's fundamentally flawed nature is the fact that the RICO statute violates not only the substantive rule of *Near* and its progeny, but virtually every procedural safeguard limiting the regulation of unprotected speech.

This Court's numerous prior opinions in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), *Heller v. New York*, 413 U.S. 483, 491 (1973), and related cases have squarely held that any mass pre-trial seizure of the entire contents of a bookstore violates the First Amendment in the absence of a prior adversary hearing designed to focus searchingly on the obscenity of *each* item sought to be seized and thereby removed from public access.

Similarly, the seizure of *all* copies of even an *allegedly obscene* item cannot be based on a mere probable cause standard consistent with the public's right of access to presumptively-protected material. *See Heller v. New York, supra.* The First Amendment rights of public and bookseller alike have always been one of the "particularly important interests" which merit protection by, at the very least, the "clear and convincing evidence" standard discussed in *California ex rel. Cooper v. Mitchell Brothers*, 454 U.S. 90, 93 (1981). Any lesser standard would be in-

consistent with the requirement that persons desiring to engage in communication presumptively protected by the First Amendment have sufficient "breathing space" in order to prevent the chilling effect of self-censorship. *See, e.g., Hustler Magazine v. Falwell,* — U.S. —, 108 S.Ct. 876, 880 (1988); *New York Times Co. v. Sullivan,* 376 U.S. 254, 272 (1964).

Moreover, there is absolutely no guarantee under Indiana law of prompt *appellate* review of mass seizures such as these, as constitutionally required under prior decisions of this Court. *See, e.g., National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977). The delay of over one year before the Indiana Court of Appeals acted on petitioner's promptly filed stay application vividly demonstrates the need for this constitutional requirement.

The complete failure of the civil RICO statute to comply with any of these procedural safeguards of First Amendment rights only serves to dramatize the inappropriateness of this statutory scheme as a response to alleged obscenity offenses. Hardly an example of the "sensitive tools" which must be employed to separate protected from unprotected speech (*Speiser v. Randall,* 357 U.S. 513, 525 (1958)), the RICO statute inevitably effects a prior restraint upon *vast* quantities of presumptively-protected materials as well as the entire on-going opera-

tion of the bookstore, theater, or other communicative business.

If upheld by this Court, the RICO Act's draconian padlocking and forfeiture provisions will also result in self-censorship of enormous quantities of constitutionally-protected material by virtue of the statute's chilling effect. At the risk of an institutional "death sentence" merely for two instances of unprotected speech, booksellers, video store and theater operators have little choice but to refrain entirely from disseminating a wide variety of sexually-oriented materials which in fact are non-obscene, and to which the public has a constitutional right of access. The insidious chilling effect of this statute on others will be no less damaging to the freedoms of speech and press than the actual padlock on the door. Both as a direct prior restraint and for its indirect chilling effect, therefore, this statute is fatally overbroad in its impact upon expression fully protected by the First Amendment.

For all these reasons, the statute should be declared invalid under the First Amendment, and the judgment of the Indiana Supreme Court should be reversed.

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ARGUMENT

I

WHERE THE ONLY PREDICATE OFFENSES ARE OBSCENITY VIOLATIONS, INDIANA'S CIVIL RICO STATUTE VIOLATES THE FIRST AMENDMENT ON ITS FACE, BOTH AS A PRIOR RESTRAINT AND AS AN OVERLY BROAD STATUTE WHICH RESTRAINS A SUBSTANTIAL AMOUNT OF CONS "U-TIONALLY-PROTECTED SPEECH

A. Standard Of Review.

Although the Indiana Court of Appeals found this statute to be a classic prior restraint in violation of the First Amendment, the Indiana Supreme Court concluded that the legislative purpose was not censorious in including obscenity as a predicate offense in its RICO statute (Cert. App. 11-12), and that the statute was accordingly immune from First Amendment scrutiny. (Cert. App. 11-15.) That conclusion is clearly at odds with this Court's prior decisions. A censorious legislative intent "is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983). *Accord: Arkansas Writers' Project, Inc. v. Ragland*, — U.S. —, —, 107 S.Ct. 1722, 1727 (1987). "[E]ven regulations aimed at proper governmental concerns can restrict unduly the

exercise of rights protected by the First Amendment." *Minneapolis Star, supra*, 460 U.S. at 592.

Rather, it is the "operation and effect of the statute" which determines the applicable standard of review. *Near v. Minnesota*, 283 U.S. 697, 708-709 and 713 (1931). *Accord Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957): "The judicial angle of vision in testing the validity of [an obscenity-injunction] statute . . . is 'the operation and effect of the statute in substance' . . . ." (Citing *Near, supra*), 354 U.S. at 441.[12]

The operation and effect of Indiana's civil RICO statute is dramatically demonstrated by the opinion below. As construed by the Indiana Supreme Court, the statute goes into *operation* simply upon allegations that there were two or more obscenity violations committed by any store in a chain of stores under common ownership. Nothing other than these two obscenity violations need be shown to trigger the entire panoply of draconian sanctions.[13]

The *effect* of Indiana's civil RICO statute is equally clear. Based on two prior obscenity violations, the stat-

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[12] "In every case, therefore, where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the *effect* of the challenged legislation." (Emphasis added.) *Schneider v. State*, 308 U.S. 147, 161 (1939).

[13] As construed by the Indiana Supreme Court, prior convictions are not even necessary. (Cert. App. 16).

ute authorizes the pre-trial padlocking of every store in a chain of stores under common ownership, thereby totally restraining every type of speech activity at the affected locations pending trial. If, for example, a national chain of bookstores, record stores or video stores had been found to have sold or rented two or more copies of a videotape or a leading men's magazine believed to be obscene, the statute, as construed by the Indiana Supreme Court, would authorize the padlocking of every bookstore, record store or video store in that "enterprise" as well as the seizure of the entire inventories and the neutral instrumentalities of the businesses pending trial.

If the two or more allegedly obscene materials are civilly adjudged obscene at trial, (1) the defendants must forfeit all of the seized assets (*i.e.*, every bookstore, video store, etc. involved becomes the property of the state);[14] (2) the defendants are permanently enjoined from engaging in the same type of business enterprise as the one which was forfeited to the state;[15] (3) the defendants must divest themselves of any interest in the bookstore, video

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[14] IC § 34-4-30.5-3(a) authorizes the forfeiture of all property "used in the course of, derived from, or realized through, conduct in violation of [the RICO statute]." Subdivision (b) thereof authorizes the seizure of all property subject to forfeiture under subdivision (a). The opinion below upheld the seizure of the entire contents of all the affected bookstores and thereby necessarily construed the statute as authorizing forfeiture of the *entire* business, not just obscene materials or the proceeds derived from their sale.

[15] IC § 34-4-30.5-2(2).

store, etc.;[16] (4) the enterprise must be dissolved;[17] and (5) any applicable business licenses and corporate charters are revoked.[18] In sum, the owner of a bookstore, newspaper or video store is absolutely restrained, solely on the basis of past incidents of unprotected speech, by one of the most virulent regimes of censorship ever adopted in this nation.[19]

The virulence of this form of censorship is concretely demonstrated not only by the seizure of the entire contents of all three Fort Wayne stores for the purpose of subsequent forfeiture, but also by the devastating order of forfeiture already imposed under the parallel provisions of the federal RICO statute. In *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va. 1987), the first federal RICO/obscenity prosecution, the trial court upheld the federal RICO statute's forfeiture provisions against a motion to dismiss. Following the defendants' convictions, the court imposed a draconian order of forfeiture (a copy of which is appended to this brief as Appendix B at App. 9-13). Pursuant to this order of forfeiture, the Government obtained the forfeiture of all assets of the defendant corporations and video stores, including all media materials, real estate, bank accounts, machinery, equipment, furniture, and even the defendants' automobiles.

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[16] IC § 34-4-30.5-2(1).

[17] IC § 34-4-30.5-2(3).

[18] IC § 34-4-30.5-2(4) and IC § 34-4-30.5-2(5).

[19] Surely if a foreign government had adopted a law which permanently silenced all those found to have engaged in any prior unprotected expression, few of us would hesitate to describe such a regime as the very embodiment of oppressive governmental suppression and censorship.

Clearly, statutes of this type cannot help but have a tremendous repressive impact in restraining presumptively-protected expression.

The devastating effect of this statute upon protected expression mandates its strict scrutiny by this Court no matter what "legislative purpose" the state may offer in its support. As this Court stated in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981): "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."

B. As Applied To The Predicate Offense Of Obscenity, Both The Pre-Trial And Post-Trial Sanctions Of Indiana's Civil RICO Statute Are Facially Unconstitutional As Impermissible Prior Restraints.

In *Near v. Minnesota*, 283 U.S. 697 (1931), this Court held that a publisher which had been found guilty of publishing nine different scandalous and defamatory editions of a newspaper and who had also been found to have "regularly and customarily" published scandalous and defamatory articles (*id.* at 706) could not be enjoined from future publication, as to do so would effect a prior restraint upon future presumptively protected expression. As this Court summarized *Near* in the subsequent case of *Kingsley Books v. Brown*, 354 U.S. 436 (1957):

> "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713. As such, it was unconstitutional." 354 U.S. at 445.

If the injunction in *Near* was an unconstitutional prior restraint, it follows, *a fortiori*, that the much more ex-

tensive restraints authorized by the Indiana civil RICO Act are impermissible. Simply because two or more past publications have been found offensive, Indiana has empowered its courts to impose a total restraint upon a business' future speech activities and to dismantle that business totally, even though its principal activity was the dissemination of expression. Surely "this is of the essence of censorship." 283 U.S. at 713.

The Indiana Supreme Court concluded that these statutes escape First Amendment scrutiny because their purpose is "anti-racketeering" and thus content-neutral. However, *Near* rejected precisely this argument when it stated that "[c]haracterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Moreover, both the pre-trial restraints that have already been imposed in this case, as well as the post-trial restraints approved by the Indiana Supreme Court, are far more onerous and restrictive of expression than even the broad restraint invalidated in *Near*. The injunction in *Near* authorized neither the seizure and forfeiture of the newspaper's assets nor the revocation of its license to do business. The *Near* injunction did not order the dissolution of the business, nor did it authorize the padlocking of the business premises where the offending speech had been generated. Rather, the *Near* injunction used civil processes to bar future expression generally. While the Indiana statute entails the same essential prior restraint

element condemned in *Near*,[20] Indiana's civil RICO statute goes *far* beyond the particular restraint invoked in *Near*.

Finally, *Near* made clear that the number or frequency of prior speech violations is irrelevant to the immunity against future restraints:[21]

> "[I]t does not matter that the newspaper or periodical is found to be '*largely*' or '*chiefly*' devoted to the publication of such derilictions." (Emphasis added). 283 U.S. at 720.

In contrast, the Indiana RICO statute permits a vastly more intrusive prohibition on future presumptively-protected speech, based upon as few as two acts of distributing obscene materials.

This Court has repeatedly held that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Heller v. New York, supra,* 413 U.S. 483, 491 (1973), quoting *New York Times Co. v. United States,* 403 U.S.

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20 A defendant convicted under Indiana's civil RICO statute for prior speech violations is enjoined "from engaging in the same type of endeavor as the enterprise in which he was engaged . . . ." IC § 34-4-30.5-2(2). The effect of such an injunction where the enterprise is engaged in speech activities is to prevent a defendant from *any* prospective speech, whether protected or not.

21 In addressing the right to engage in unprotected expression without prior restraint, this Court observed that one "does not lose his right by exercising it. If [the] right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition." 283 U.S. at 720. Indeed, as noted *supra*, there was a finding of fact that the enjoined business had "regularly and customarily" published scandalous and defamatory articles. *Id.* at 706.

713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963). *Accord: Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 181 (1968); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558-559 (1975); and *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316, fn. 13 (1980). In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 583, fn. 6 (1983), this Court recently reaffirmed that prior restraints "strike to the core of the Framers' concerns" and accordingly compel a standard of scrutiny even higher than that applied to most regulations challenged as violative of the First Amendment.

Kingsley Books, Inc. v. Brown, supra, was one of the few cases in which this Court upheld any type of prior restraint upon allegedly obscene material. This Court sustained a New York statute which authorized an injunction, after an adversary hearing, prohibiting the sale or distribution of *specific publications* judicially determined to be obscene. In upholding the statute, the Court sharply distinguished the situation in *Near*:

> "Unlike *Near,* [the New York statute] is concerned solely with obscenity and . . . it studiously withholds restraint upon matters not already published and not yet found to be offensive." 354 U.S. at 445.

The contrast between the restraint in *Kingsley Books* and the case at bar could not be more dramatic. Based upon an adversary judicial determination of obscenity, the restraint in *Kingsley* was upheld because it was tailored to impact only on specific materials that had been pre-

viously adjudicated as unprotected expression. In the present case, if a court makes a determination that two or more prior obscenity violations were committed, it uses its pre-trial padlocking power and its post-trial forfeiture and other powers to bar the dissemination of *any* materials, whether obscene or protected. Unlike the restraint in *Kingsley*, the restraints in this case directly affect *protected* expression.

Subsequent to *Kingsley*, this Court decided numerous cases in which it condemned various state procedures for seizing or restricting alleged obscenity as impermissible prior restraints upon constitutionally-protected expression. In *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court struck down a Missouri civil statutory procedure for seizure and destruction of obscene materials. Pursuant to the statute, police officers obtained, *ex parte*, a search warrant authorizing them to seize any and all obscene materials found at the defendant's premises. Pursuant to warrant, the officers seized approximately 11,000 copies of 280 publications. At trial, the court found a majority of the seized titles to be non-obscene, but ordered all copies of the obscene titles destroyed. This Court held that the statutory scheme lacked adequate procedural safeguards to guarantee the protection of non-obscene sexually-oriented materials and, for that reason, not only invalidated the seizure of the materials found to be constitutionally-protected, but also reversed the judgment forfeiting the materials actually found obscene.

The greatest significance of the *Marcus* decision, however, was that, in fashioning the rule that procedural safeguards are necessary to separate obscenity from protected speech, the Court: (1) implicitly concluded that the warrant procedure constituted a prior restraint (a conclusion later rendered explicit in this Court's summary of *Marcus* in *Heller v. New York*, 413 U.S. 483, at 491 (1973)); and (2) necessarily premised its opinion on the fundamental concept that *protected expression should not be removed from the public domain simply because, at the same premises, unprotected expression had also been sold or exhibited.* (Had this not been the Court's rationale, there would have been no need for the procedural safeguard of a prior adversary hearing to separate obscenity from protected expression.)

This underlying premise of *Marcus* was again applied in *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964), to invalidate a Kansas civil statutory procedure for seizure and forfeiture of obscene materials. Pursuant to that statute, police officers had presented seven books to a magistrate, who examined the materials *ex parte* and issued a search warrant directing seizure of all copies of the seven books as well as any other books of a similar type by the same publisher. Pursuant to the warrant, the officers seized 1,715 copies of 31 different titles and, after an adversary hearing was held in which all the seized items were found obscene, a judgment was entered for their forfeiture. This Court concluded that the Kansas procedures lacked adequate procedural safeguards to separate obscenity from constitutionally-protected expression, and as a result the Court reversed the judgment of forfeiture, finding the proceeding void *ab initio*, regardless of whether the materials were obscene.

As in *Marcus*, the crucial unstated premises of the opinion in *Quantity of Books* were: (1) the warrant pro-

cedure constituted a prior restraint,[22] and (2) proven violations, and even numerous proven violations, of a state's obscenity laws cannot justify the removal from circulation of *any* materials which might be constitutionally protected.

Not only were *Marcus* and *Quantity of Books* decided based upon a premise fully determinative of the present case; the prior restraints involved in those cases were far less severe than those imposed here. In *Marcus*, only the items actually believed to be obscene were seized, and the store was not padlocked. In the present case *all* items were seized, and the stores themselves padlocked, simply because a tiny fraction were alleged to have been obscene.

In *Quantity of Books*, all copies of 31 different titles were seized even though only seven titles had previously been evaluated by the judge. Accordingly, a vast quantity of presumptively-protected books was seized simply because *other* books were believed to be obscene. Thus, the rationale for seizure in *Quantity of Books* is very analogous to the rationale for seizure under the Indiana statute. However, the *restraint* imposed in *Quantity of Books* was not nearly as great as the devastating sanctions of padlocking and forfeiture authorized here.

In *Heller v. New York*, 413 U.S. 483, 491 (1973), and again in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327-328 (1979), this Court reiterated that the principles of *Marcus* and *Quantity of Books* remain good law: any large-scale removal of speech materials based on an allegation

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22 Again, see this Court's characterization of the holding in *Quantity of Books* rendered in *Heller v. New York, supra*, 413 U.S. at 491.

that they are obscene requires a prior adversary hearing. *Heller's* reaffirmation of these cases was unquestionably based on this Court's concern that alleged obscenity violations not cause the public to be deprived of access to other presumptively protected materials. Indeed, so concerned was this Court in *Heller* about the premature suppression of presumptively protected materials alleged to be obscene that theater owners were held to be entitled to make and exhibit a copy of any seized film pending trial.

In *Roaden v. Kentucky, supra*, 413 U.S. 496 (1973), and in *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), this Court expressly held that the seizure of one or more motion picture films from a theater by an officer based upon his personal determination of obscenity is a form of constitutionally impermissible prior restraint. 413 U.S. at 504. Obviously the pre-trial seizures actually implemented in the present case, as well as the post-trial forfeitures authorized by statute, constitute prior restraints *far* more severe than the seizure of one or even a few films as condemned in *Roaden* and *Lee Art, supra*.

In *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), this Court struck down a Texas nuisance injunction statute which authorized a court to issue a preliminary injunction of indefinite duration against the exhibition of any named or unnamed obscene films on a showing that the enjoined party had, in the past, exhibited any obscene films. The statute had also authorized a one-year padlocking of any location where one or more obscene items had been sold or exhibitd.

All 14 judges of the Fifth Circuit sitting *en banc* unanimously agreed that the portion of the statute author-

izing a one-year padlocking of the location would be an unconstitutional prior restraint on the businesses' ability to disseminate constitutionally-protected expression. 587 F.2d at 165-166. (However, that Court then gave the statute what it conceded was a "strained" saving construction so that the one-year closure provision would be "inapplicable" to obscenity. *Id.* at 166.) A majority of that court additionally concluded that the injunctive order against exhibition of any future unnamed obscene materials would also be an impermissible prior restraint.

The only issue before this Court in *Vance* was the constitutionality of the injunction against the future dissemination of both named and unnamed obscene materials, because Texas did not appeal the Fifth Circuit's 14-0 ruling striking the padlocking provision. This Court found the preliminary injunction against specific named films to be unconstitutional because non-obscenity would not be a defense to contempt charges.[23] As to the injunction against future unnamed obscene materials, this Court found that the statutory scheme was procedurally deficient in any event because it authorized prior restraints (preliminary injunctions) of indefinite duration. 445 U.S. at 316-317.

This Court's opinion in *Vance* is highly relevant to the present decision. First, *Vance* concluded that an injunction against unnamed obscene films is in fact a "prior restraint . . . more onerous than is permissible under *Freedman v. Maryland*[, 380 U.S. 51 (1965)] and *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975)."

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23 See 445 U.S. at 316 and see also fn. 4, *id.*, at 312.

445 U.S. at 317. Surely the restraints imposed in the present case are *far* more onerous than the one held unconstitutional in *Vance*.

Second, *Freedman's* underlying rationale, necessary to the decision in *Vance*, is that the state should not interfere with constitutionally-protected expression in its efforts to eliminate the obscene. The various procedural safeguards required by *Freedman, Vance, Marcus* and a long line of this Court's cases were created to keep non-obscene expression out of the state's anti-obscenity net. If Indiana may completely shut down a bookstore (or indeed an entire chain of bookstores) simply because it has found two or more items—later determined to be obscene—at one store, then it will have succeeded, in one swift stroke, in gutting the protections for non-obscene speech this Court has so painstakingly developed through many decades of its decisions.[24]

In *Arcara v. Cloud Books, Inc., supra,* — U.S. —, 106 S.Ct. 3172 (1986), a narrow majority of this Court recently held that an adult bookstore could be shut down by the state in order to prevent the recurrence of unlawful conduct not involving speech. However, the Court's opinion reaffirmed that First Amendment scrutiny would apply

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24 *See, e.g., Marcus v. Search Warrant,* 367 U.S. 717 (1961); *Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Tietel Film Corp. v. Cusack,* 390 U.S. 139 (1968); *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968); *Blount v. Rizzi,* 400 U.S. 410 (1971); *United States v. Thirty-Seven Photographs,* 402 U.S. 363 (1971); *Heller v. New York,* 413 U.S. 483 (1973); *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975); and *Brockett v. Spokane Arcades, Inc.,* (Brockett I), 454 U.S. 1022 (1981).

"where it was conduct with a significant expressive element that drew the legal remedy in the first place. . . ." 106 S.Ct. at 3177. Moreover, the concurring opinion of Justices O'Connor and Stevens indicated that a majority of this Court would find First Amendment scrutiny applicable where, as here, a closure order was based on prior obscenity violations:

> "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at —, 106 S.Ct. at 3178.

Since the present case, unlike *Arcara*, involves a severe restraint premised solely on the sale of allegedly obscene materials, the Indiana Supreme Court erred in failing to analyze it under the strict First Amendment standard of review applicable to prior restraints.

The Indiana Supreme Court's conclusion is also inconsistent with that reached by the overwhelming majority of state appellate courts and lower federal courts which have considered the very closely analogous question of the constitutionality of laws which permit the license revocation or padlocking of a business where prior obscenity offenses have occurred.[25]

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[25] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc

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1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976) *cert. den.* 429 U.S. 922 (1976); *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *People v. Sequoia Books*, 518 N.E.2d 775 (Ill.App. 1988); *State ex rel. Blee v. Mohney Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 So.2d 158 (La.1977), *overruling* La.App., 341 So.2d 23; *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg*, 347 A.2d 712 (Penn. 1975); and *New Rivieria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967). *See also J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 494-495 (9th Cir. 1984), *rev'd. on other grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), *vacated and remanded on other grounds*, 423 U.S. 976 (1975), *order re-entered* August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd*, 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied upon a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd.* 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Natco Theatres Inc. v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Oregon Bookmark Corp v. Schrunk*, 321

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The common thread of all these cases is their conclusion that the First Amendment doctrine of prior restraints prohibits the government from restraining future expression on the basis of prior speech violations. All of these decisions explicitly or implicitly reject the notion that padlocking or license revocation is simply a subsequent punishment and thereby need not be subjected to First Amendment scrutiny as a prior restraint.

Perhaps one of the clearest ways to illustrate the pernicious evil of this statute is to observe that if the state can make obscenity a predicate RICO offense, there is no constitutional obstacle to making libel or false advertising predicate RICO offenses as well. As a result, under the state's theory of constitutional law, there would be no impediment to padlocking and forfeiting the New York Times Company, the Washington Post or the National Broadcasting Co. simply because the state proved that two libels or deceptive ads were published.

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F.Supp. 639 (D.Oregon 1970); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.C.Cr.Ct. 1979); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *see also Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980); *Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972).

Similarly, under the existing statute, if a nationwide bookstore chain such as Waldenbooks or B. Dalton's had sold two or more copies of a single issue of *Penthouse Magazine* which subsequently was found obscene, the entire inventories and assets of Waldenbooks or B. Dalton's could be forfeited to the state and every store in that "enterprise" could be padlocked, thereby prohibiting them from even selling the Bible. Obviously, the theory upon which the state is proceeding herein is inconsistent with basic First Amendment protections.

C. The Indiana Statutory Scheme Must Also Fall When Analyzed As An Overly Broad Law Which Restricts Substantial Amounts Of Constitutionally-Protected Expression.

Indiana's civil RICO statute must also fall as legislation which broadly stifles protected expression even though arguably aimed at legitimate state goals.

In *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964), this Court definitively ruled that the punishment for unlawful association and expression could not include an undue restriction on the prospective exercise of fundamental constitutional rights. In that case, the state of Alabama obtained an injunction against the N.A.A.C.P. to prevent it from conducting any business in the state of Alabama. The state sought the injunction in part because the N.A.A.C.P. was carrying on "its activities in Alabama without complying with state laws requiring foreign corporations to register . . . ." 377 U.S. at 303. Although the injunction was upheld by the Alabama Supreme Court, this Court held that "past failure to register could not constitutionally be made the basis for *permanently* preventing the Association from registering and thereby denying its mem-

bers the right to associate in Alabama." 377 U.S. at 306, fn. 12 (emphasis in original).

In response to the state's additional argument that the N.A.A.C.P. violated Alabama law by organizing consumer boycotts, this Court then held that even assuming the underlying state laws were valid proscriptions of the organization's conduct, the sanctions imposed for their violation were nonetheless unconstitutional:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. '* * * [T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' Cantwell v. Connecticut, 310 U.S. 296, 304. '* * * [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488 (footnote omitted)." (Citation omitted) *N.A.A.C.P. v. Alabama, supra*, 377 U.S. at 307-308.[26]

Applying the foregoing mode of analysis, it is quite clear that the inclusion of obscenity as a predicate RICO offense subjects those whose only offense is two obscenity violations to the most repressive prospective restraints on expression imaginable. The state can not only seize and

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[26] To the same effect, see the numerous cases cited in support of this proposition at 377 U.S. at 308, and in *Aptheker v. Secretary of State*, 378 U.S. 500, 507-508 (1964). *Cf. New York v. Ferber*, 458 U.S. 747, 773 (1982) ["the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial."]

forfeit the entire inventory of every bookstore, newsstand, video-store, theater, motion picture studio or newspaper in a chain of such businesses, but can also: (1) seize all neutral instrumentalities necessary to engage in future presumptively protected expression (*e.g.*, motion picture projectors, printing presses, etc.); (2) padlock all such businesses; (3) revoke all applicable business licenses and corporate charters; and (4) enjoin all members of the "enterprise" from ever again engaging in the type of business which the enterprise operated. Moreover, as construed and applied by the respondent Indiana authorities, the statute authorizes the forfeiture of the real property of any landlord who rents his store or building to an "enterprise" which subsequently produces, distributes, sells, rents or exhibits two or more obscene items.[27] A more pervasive restraint on protected expression could hardly be imagined.

Where, as here, a statutory scheme imposes a substantial restriction on constitutionally-protected expression, a strict standard of scrutiny is required to determine whether the purposes underlying such a law could possibly necessitate so severe a restraint. *Schad v. Burough of Mount Ephraim*, 452 U.S. 61 (1981).

In *Schad*, this Court applied a strict standard of scrutiny in striking down a zoning ordinance that prohibited all live entertainment (*see* fn. 7, 452 U.S. at 68 and accompanying text), and concluded that "[t]he Borough has not established that its interests could not be met by

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[27] *See* Amicus Brief of Burke Mendenhall filed herein in support of Petition for Writ of Certiorari.

restrictions that are less intrusive on protected forms of expression." *Id.* at 74.

Similarly, Indiana cannot justify its inclusion of obscenity violations as conclusive evidence of racketeering activity, subjecting the violator to the panoply of repressive RICO sanctions. If punishment is the purpose of including obscenity as a RICO trigger, then the statute is broader than necessary because existing criminal obscenity statutes in Indiana were created precisely for the purpose of punishing such violations.

If the purpose is not punishment, but the dismantling of the business in order to prevent the possibility of any future violations, then such purpose not only constitutes the essence of prior restraint but is also clearly overbroad where, as here, the only predicate acts consist of allegedly illegal speech activities.[28] *See Arcara v. Cloud Books, Inc., supra,* 106 S.Ct. at 3178 (concurring opinion of Justices O'Connor and Stevens). As *Near v. Minnesota, supra,* clearly held, the intentional restriction of all future ex-

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[28] State and federal governments have limited discretion in establishing punishments for obscenity violations, as contrasted to other crimes. As stated in *Smith v. California, supra:*

> "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power." 361 U.S. at 155.

Smith recognized that "[t]he ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book" (*id.* at 152), but went on to point out that the state has *no* "power to restrict the dissemination of books which are not obscene." (*Id.*) *See also Roth v. United States,* 354 U.S. 476, at 488 (1957) and *Miller v. California,* 413 U.S. 15, 23-24 (1973).

pression solely because of past unlawful expression "is of the essence of censorship." 283 U.S. at 713.

For all the foregoing reasons, both the pre-trial and post-trial sanctions of Indiana's civil RICO statute are facially unconstitutional as applied to those whose only predicate offenses are obscenity violations.

D. This Court Has Jurisdiction To Consider The Facial Validity Of Both The Pre-Trial And Post-Trial Sanctions Authorized By Indiana's Civil RICO Statute.

This Court has jurisdiction to review the facial validity of both the pre-trial and post-trial sanctions at issue in this case consistent with 28 U.S.C. § 1257's jurisdictional limitation that this Court only review "final" judgments from the state courts.

The Indiana Supreme Court's ruling has finally determined that the civil RICO Act's pre-trial restraints on First Amendment expression imposed in this case are constitutional and shall remain in effect pending trial. That determination is sufficiently final to invoke this Court's jurisdiction under 28 U.S.C. § 1257. *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977); *M.I.C. Ltd. v. Bedford Township,* 463 U.S. 1341 (1983) (per Justice Brennan as Circuit Justice); *Cf. Renaissance Arcade and Bookstore v. County of Cook,* — U.S. —, 106 S.Ct. 9 (1985) (per Justice Stevens as Circuit Justice).

As the pre-trial sanctions included an order that petitioner's business be padlocked pending trial, the prior restraint issue is necessarily presented in petitioner's challenge to the pre-trial, as well as post-trial, sanctions.

The Indiana Supreme Court also finally determined that the post-trial sanctions under Indiana's civil RICO

statute are immune from First Amendment scrutiny where the only predicate offenses are obscenity violations. Indeed, by upholding the pre-trial seizures which are statutorily authorized only for the purpose of preserving assets for post-trial forfeiture, and by expressly concluding that the post-trial forfeiture remedy would not pose an unconstitutional prior restraint, the Indiana Supreme Court gave a concrete, non-speculative interpretation of the permissible scope of the statute's post-trial forfeiture remedies. This Court's prior decisions establish beyond doubt that such a determination is of sufficient finality to invoke this Court's jurisdiction.

Where, as here, a federal issue has been finally decided by the highest state court and further trial proceedings are pending in which the party seeking review might prevail on non-federal grounds, thereby precluding review of the federal issue by this Court, this Court has deemed such rulings to be "final," particularly where, as here, "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483 (1975).[29] *Accord Hudson Distributors v. Eli Lilly*, 337 U.S. 386 (1964) [finding finality under these circumstances where federal policy recognized preemptive effect of federal antitrust laws over parallel state regulations], and *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, fn. 6 (1974) [finding finality under these circumstances where federal policy is to vindicate First Amendment rights].

This Court's rationale for finding jurisdiction in *Miami Herald, supra,* is particularly pertinent here:

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[29] A thorough summary of these types of "finality" cases is presented in *Cox*, 420 U.S. at 482-485.

> "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the statute] could only further harm the operation of a free press. Mills v. Alabama, 384 U.S. 214, 221-222 (1966) (Douglas, J., concurring)." 418 U.S. at 247, fn. 6.

In the present case, it would be equally intolerable to leave unanswered the question whether the forfeiture and license revocation remedies of a civil RICO statute can be applied to those whose only offense involves speech-related conduct. As discussed further below, the chilling effect which such an unsettled status would create would have an intolerable impact on federal constitutional rights throughout both Indiana and the nation.

It is also relevant that Chief Justice Burger's majority opinion in *Miami Herald* cited with approval the concurring opinion of Justice Douglas in *Mills v. Alabama*, 384 U.S. 214, 221-222 (1966), which pointed out that "even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would [nonetheless] be warranted in reviewing this case" on grounds that "where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." *Id.*

Accordingly, this Court has jurisdiction to review the constitutionality of the civil RICO statutory scheme in its entirety, and, petitioner respectfully submits, should do so.

II

EVEN IN THEIR OPERATION UPON MATERIALS ACTUALLY ALLEGED TO BE OBSCENE, THE PROCEDURES AUTHORIZED BY THE INDIANA RICO STATUTE VIOLATE VIRTUALLY EVERY PROCEDURAL SAFEGUARD REQUIRED BY THE FIRST AMENDMENT.

The constitutional invalidity of this statutory scheme is further underscored by the fact that it is completely devoid of the procedural safeguards required under the First Amendment in any proceeding to sanction unprotected speech. Even as applied to materials actually alleged and shown to be obscene, the civil RICO Act authorizes proceedings which are void *ab initio* because they violate virtually every procedural rule this Court has deemed essential to ensure "the necessary sensitivity to freedom of expression." *Freedman v. Maryland,* 380 U.S. 51, 58 (1965).

As this Court emphasized in *Speiser v. Randall,* 357 U.S. 513, 525 (1958), "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finally drawn . . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools." Accordingly, the Court later stressed, "a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for protected speech." *Marcus v. Search Warrants,* 367 U.S. 717, 731 (1961). Obviously, the procedures authorized by the Indiana civil RICO statute as applied to obscenity entail disastrous consequences for protected speech.

First, the statute on its face and as applied in this case authorizes the pre-trial seizure of the entire communicative "enterprise" pursuant to an *ex parte* hearing without notice to the defendants. Even if the entire contents of the bookstore were alleged to be obscene (as of course they are not here), this Court has unequivocally held that an adversary hearing must be afforded prior to any such mass seizure of allegedly unprotected materials. In *Marcus v. Search Warrants, supra,* and *Quantity of Copies of Books v. Kansas,* 378 U.S. 205 (1964), as detailed above, this Court held void *ab initio* proceedings which involved the mass seizure of communicative materials in the absence of a prior adversary hearing "designed to focus searchingly upon the question of obscenity." *Marcus, supra,* 367 U.S. at 732.

If an *ex parte* injunction, which "represents the most devastating of restraints on constitutionally protected activities" *(Walker v. City of Birmingham,* 388 U.S. 307, 346 (1967)), cannot be imposed even upon allegedly obscene materials, *a fortiori* it cannot be imposed upon presumptively protected expression as to which the statute renders any allegation of obscenity irrelevant. Any such seizure upon allegations that *other* material is unprotected constitutes a blatant and impermissible prior restraint.

As vividly highlighted by the facts of this case, these pre-trial seizure and padlocking measures authorized by the RICO statute also create a restraint of indefinite duration of the sort this Court condemned in *Freedman v. Maryland,* 380 U.S. 51 (1965), and more recently in *Vance v. Universal Amusement Co., Inc.,* 445 U.S. 308 (1980). In *Freedman,* one of the basic First Amendment procedural requirements this Court deemed necessary even for the

restraint of *allegedly obscene* materials was a final adjudication within "the shortest fixed period compatible with sound judicial resolution." 380 U.S. at 59. In *Vance*, this Court struck down a statute authorizing interim injunctions of indefinite duration against named or unnamed obscene films, upon a preliminary finding of one or more obscene exhibitions in the past.[30]

The Indiana statute clearly transgresses this First Amendment procedural mandate, entailing no requirement of a final judicial determination within any specified period. The Indiana Supreme Court held only that trial was required within a "reasonable" time, hardly an adequate guarantee even for allegedly unprotected speech.

Similarly, the Indiana RICO scheme fails to afford prompt or immediate *appellate* review of interim or final restraints upon expression, as required in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 1977). The gravity of this procedural failing is dramatized by the facts of this case, in which petitioner filed an application for a stay in the state Court of Appeals within days of the trial court's denial of its motion to vacate the *ex parte* seizure order. Despite continuous efforts to obtain prompt appellate review, the three Fort Wayne bookstores remained padlocked for more than a year before the Court of Appeals granted the stay.

The statutory scheme also violates First Amendment requirements in establishing and apportioning the burden

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30 *See also United States v. Thirty-Seven Photographs*, 402 U.S. 363, 371-72 (1971), condemning "delays as long as 40 days and even six months between seizure of obscene goods and commencement of judicial proceedings," and requiring final adjudication within 60 days.

of proof. In *Speiser v. Randall, supra*, 357 U.S. 513 (1958), this Court held that the burden of proof and the burden of going forward are of critical importance where the issue is entitlement to constitutional protection under the First Amendment. (This general principle was subsequently applied specifically in *Freedman v. Maryland, supra*, in the context of administrative censorship schemes.) As construed by the Indiana Supreme Court, however, the burden of proof and the burden of going forward is put entirely upon the defendant where the State obtains an *ex parte* order of seizure and closure. "Generally, a defendant would initiate [a challenge to] such action by the filing of a motion to vacate the seizure order." (Cert. App. 19.) The Court went on to note that if the defendant did not file a motion to vacate, then the only other remedy would be at a subsequent trial on the merits.

Additionally, the *ex parte* seizure and closure order issues upon a mere probable cause showing, and the final forfeiture proceeding is conducted merely upon a civil preponderance standard of proof. However, this Court intimated in *California ex rel. Cooper v. Mitchell Bros.*, 54 U.S. 90 (1981), that because of the importance of First Amendment interests, at least a "clear and convincing" standard is required in cases of this nature.[31]

Procedurally, the Indiana statute even in its operation to suppress alleged obscenity perfectly illustrates the dangers of "a scheme of governmental censorship devoid

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31 The California courts applied this standard upon remand of the underlying civil action to enjoin the exhibition of allegedly obscene films, *People ex rel. Cooper v. Mitchell Brothers*, 128 Cal.App.3d 937, 180 Cal.Rptr. 728 (1982).

of the constitutionally required safeguards," *Bantam Books v. Sullivan*, 372 U.S. 58, 64 (1963). As the Indiana Court of Appeals characterized the statute:

> "Devoid of procedural strictures including the standard of proof of a criminal prosecution, these civil remedies . . . may indeed curb the availability of obscenity but [cut] a broad swath into the realm of protected expression as well." 479 N.E.2d at 592.

The Court of Appeals concluded, therefore,

> "that the seizure orders against these defendants and the statutes' application to obscenity generally must be characterized as both substantively and procedurally unconstitutional . . .: as prior restraints of protected speech, or as impermissible procedures for restraining speech which may or may not be protected." *Id.* at 598.[32]

Petitioner does not contend that a statutory scheme so fundamentally flawed under the First Amendment could be salvaged merely by proper adherence to constitutionally-required procedures. Rather, this recitation of procedural deficiencies is merely to underscore the complete inappropriateness of the RICO statute's remedies as a means of regulating obscenity, representing as they do the most "insensitive tools" yet devised for that purpose.

The Georgia Supreme Court in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974), struck down a closely analogous obscenity nuisance statute which authorized the permanent closure of a bookstore for one prior obscenity violation, the broad sweep of such a rem-

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[32] See the Court of Appeals' entire discussion of the statute's procedural inadequacies at Cert. App. 58-70.

edy "thereby *precluding the application of . . . procedural safeguards* and creating an unconstitutional restraint" upon presumptively-protected communication. (Emphasis added.) Aptly summarizing the constitutional flaws at issue here, the Georgia Court concluded that an overbroad statute of this type:

> "creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancer-our obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society free of obscene publications but otherwise full of poetry and prose."

III

AS APPLIED TO THE PREDICATE OFFENSE OF OBSCENITY, THE RICO STATUTE'S SEIZURE, FORFEITURE, AND OTHER CIVIL REMEDIES CREATE AN UNPRECEDENTED AND CONSTITUTIONALLY IMPERMISSIBLE CHILLING EFFECT UPON A VAST RANGE OF PROTECTED EXPRESSION.

The pernicious effects of this draconian statute extend far beyond its direct operation upon communicative businesses which may be targeted for seizure and forfeiture. The very existence of the civil RICO statute with its extraordinarily severe penalties creates a chilling effect which would suppress indirectly what cannot be directly censored: a vast array of constitutionally-protected, non-obscene expression. The threat of pre-trial seizure and post-trial forfeiture of entire bookstores, theaters, video stores, or even chains of related communicative businesses,

merely for twice having disseminated materials subsequently deemed unprotected, creates an unprecedented *in terrorem* effect which can only result in pervasive self-censorship of protected materials. From this perspective as well, the Indiana RICO statute facially violates the First Amendment requirement that any such regulation be "narrowly tailored" to avoid the suppression of protected along with unprotected speech.

This Court has continually recognized that because First Amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society," they "need breathing space to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The very "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions," *id.*, creating "a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within [their] purview." *Thornhill v. Alabama*, 310 U.S. 88, 98 (1940). *See also Hustler Magazine v. Falwell*, — U.S. —, 108 S.Ct. 876, 880 (1988).

Integral to this Court's holding in *Roth v. United States*, 354 U.S. 476 (1957), that obscenity could be regulated as unprotected speech, was the stipulation that such regulation must not infringe upon the untrammeled circulation of *protected* materials.

> "[S]ex and obscenity are not synonymous . . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." 354 U.S. at 487.

Because protected expression must not get caught up in the nets designed to snare obscenity, the power to regulate in this area must be strictly limited: "The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary." *Id.* at 488.

The Indiana civil RICO statute, if sustained, would rip that door from its hinges, by imposing an institutional death sentence upon any communicative business civilly adjudged to have twice disseminated obscene material. These dramatically enhanced penalties for obscenity offenses, combined with the inherent vagueness of the obscenity definition and the closely related problem of scienter, can only serve to create an unprecedented regime of self-censorship. By making the dissemination of *any* sexually-explicit materials an ultrahazardous endeavor, these RICO statutes by their operation and by intent cast a chilling pall guaranteed to compel First Amendment businesses to "steer far wider of the unlawful zone," a result this Court long ago condemned in *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Although this Court has struggled mightily to formulate an adequate definition of obscenity, the vagueness problem inherent in any such attempt persists. Whether or not one concludes that the vagueness of the *Miller* definition reaches a constitutionally intolerable level, the fact remains that the defendant charged with an obscenity offense almost never has advance knowledge that the material is obscene and therefore illegal. Unlike defendants

who have committed any of the other predicate RICO offenses, *e.g.* murder, robbery, or drug-trafficking, defendants alleged to have disseminated obscene materials may have done so fully and reasonably believing in the legality of their conduct.

Clearly, it is difficult if not impossible to predict what materials will be targeted for obscenity prosecution and subsequently adjudged to be obscene. Literary classics and major motion pictures have been subjected to obscenity prosecution; "Carnal Knowledge" was deemed obscene at trial by the Georgia Supreme Court until this Court reversed in *Jenkins v. Georgia*, 418 U.S. 153 (1974). Issues of *Penthouse*, available at most newsstands and convenience stores, have been declared obscene, *see Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353 (1980), and similar household-name magazines such as *Playboy* are frequently threatened with obscenity prosecution. *See, e.g., Council for Periodical Distributors Ass'n v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986). *Compare State v. Walden Book Co.*, 386 So.2d 342 (La. 1980), finding *Penthouse* to be constitutionally protected.

Even in formulating the current obscenity standard in *Miller v. California*, 413 U.S. 15, 23 (1973), this Court recognized that the regulation of obscenity "is an area in which there are few eternal verities." Nevertheless, the *Miller* majority sought to eliminate the problem of "fair notice" by reducing to a tolerable level the inherent subjectivity in the identification of obscenity. The Court formulated what it considered to be a "bright line" distinction between protected and unprotected erotic expression: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of ob-

scene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct." 413 U.S. at 27. In the intervening 15 years, changing social conditions and technology have greatly eroded any "fair notice" of illegality provided by anti-obscenity statutes, particularly as mass popular viewing of X-rated videotapes has made "community standards" a more elusive concept than ever. With the advent of the "video revolution," X-rated videotapes of the type formely regarded as "hardcore" have become standard viewing fare in American homes. Rentals of such videotapes, estimated to exceed 100 million units in 1986, are predicted to continue to increase dramatically.[33] Most recently, *Newsweek* (February 1, 1988 at p. 44) reports the estimate that "more than 20 million Americans now watch at least one blue video each week."

Community standards, which have always been subject to criticism as "vague and unascertainable," such that the question of obscenity "is determined primarily by individual jurors' subjective reactions to the materials . . . rather than by the predictable application of rules of law," *Smith v. United States*, 341 U.S. 281, 314-316 (1977) (Justice Stevens, dissenting) have become even less ascertainable as a result of these developments. The statistics regarding the popularity of adult, sexually-explicit films indicate a dramatic shift in community standards, toward widespread acceptance of graphic depictions of sexuality. The result has been the complete erosion of what the *Miller* Court believed at the time to be a "bright-line" standard—a category of "hardcore" materials which producers and

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[33] See Petition for Writ of Certiorari, pp. 24-27.

distributors were given "fair notice" to eschew, but many of which now represent protected expression.[34]

Given this situation in which the *Miller* guidelines have become increasingly amorphous, obscenity statutes not only fail to give "fair notice" to communicative businesses, they equally fail "'to establish minimal guidelines to govern law enforcement,'" another variety of vagueness this Court recently condemned in *Kolender v. Lawson,* 461 U.S. 352, 358 (1983), quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974). As a result, obscenity statutes have increasingly come to "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" 461 U.S. at 358, quoting 415 U.S. at 575. Their enforcement has become, predictably, ever more "arbitrary and erratic." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 88 (1973) (Brennan, dissenting).

Just as vagueness continues to present constitutional difficulties in the regulation of obscenity, the closely-re-

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[34] These changes in community standards have only exacerbated the vagueness problems noted by Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 84 (1973):

> "Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncracies of the person defining them. Although we have assumed that obscenity does exist . . . , we are manifestly unable to describe it in advance, except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech."

As Justice Scalia, concurring in *Pope v. Illinois,* — U.S. —, 107 S.Ct. 1918, 1923 (1987), has similarly observed, "it is quite impossible to come to an objective assessment of (at least) literary or artistic value."

lated issue of scienter also factors into the calculus of chilling effect. As this Court noted in *Mishkin v. New York,* 383 U.S. 502, 511 (1966), "the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." Subsequently, the element of scienter constitutionally required for conviction of obscenity offenses has been defined as "knowledge of the contents[,] character and nature of the materials." *Hamling v. United States,* 418 U.S. 87, 123 (1974). This scienter requirement has been reduced to the vanishing point in practical application, however: *see Sherwin v. United States,* 572 F.2d 196, *cert. denied* 437 U.S. 909 (1978), (conviction of obscenity on mere knowledge of material's "sexual orientation"); *Sewell v. Georgia,* 238 Ga. 495, 233 S.E.2d 187, appeal dismissed, 435 U.S. 982 (1978) ("constructive knowledge" of material's contents sufficient scienter for obscenity conviction). Particularly in the case of the general distributor who desires to market a wide range of materials including the extraordinarily popular X-rated videos, for example, this very low threshold of scienter only exacerbates the "inherent ambiguities" of the obscenity definition and increases the peril of anyone disseminating erotic materials. Unable to make a safe judgment that much popular erotic material would be immune from prosecution, the distributor or video store operator has little choice but to engage in self-censorship of precisely the sort this Court wisely sought to preclude in *Smith v. California,* 361 U.S. 147 (1959).

Even assuming these vagueness and scienter problems do not create an unconstitutional chilling effect in the con-

text of garden-variety obscenity prosecutions, the additional factor of limitless confiscatory penalties in the form of civil RICO liability certainly exceeds First Amendment limitations in its deterrence of protected erotic expression. The specter of RICO prosecution solely for two obscenity violations[35] creates an informal regime of self-censorship at least as suppressive as that imposed by the strict-liability ordinance declared unconstitutional for that reason in *Smith*.

Faced with the drastic seizure, forfeiture and other RICO sanctions, failure to discern accurately the "dim and uncertain line" separating protected expression from obscenity is fraught with the extreme peril of forfeiting the entire communicative business to the state. Inevitably, many book-sellers, theater and video store operators will decide to exclude from their wares any and all sexually-oriented materials, the protected along with the unprotected, for fear of erring in the extremely difficult judgment as to whether any given item might now or at some later time be prosecuted as obscene.

Following its decision in *Roth* that obscenity could be criminalized as unprotected speech, this Court in *Smith v. California, supra,* was immediately confronted with an ordinance imposing strict liability upon a bookseller for possession of obscene material. The Court concluded this type of regulation would "work a substantial restriction

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[35] Under the Indiana RICO statute, predicate obscenity offenses include even display or dissemination of non-obscene "harmful matter" to minors, or display for sale of such material within 500 feet of a church or school, pursuant to I.C. § 35-49-3-3.

on the freedom of speech and of the press" by its chilling effect, 361 U.S. at 150, emphasizing that "our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene." *Id.* at 152. Noting the stricter standards applicable to regulation "having a potentially inhibiting effect on speech," the court articulated the essential problem of such chilling legislation: if speakers are required to act at their peril, "the free dissemination of ideas may be the loser." *Id.* at 151. A law like that in *Smith* is objectionable because it

> "tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge . . ., he will tend to restrict the books he sells to those he has inspected, and thus the State will have imposed a restriction upon . . . constitutionally protected as well as obscene literature. . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to [materials] the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Id.* at 153-154.

Likewise the Indiana RICO statute, authorizing the ultimate remedy of forfeiture merely for two sales or exhibitions of unprotected materials, makes First Amendment businesses "the strictest censors of their merchandise," and "has such a tendency to inhibit constitutionally protected expression that it cannot stand under the Constitution." *Id.* at 152, 155.

Knowledge of materials' obscenity is not legally required and is rarely possible under current standards; the penalty imposed for a wrong guess upon that score thus becomes crucial in assessing a law's chilling effect. Building upon the Court's concern in *Smith* to avoid self-censorship, this Court in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), held that the "malice" standard for libel actions by public figures was essential so that debate on public issues could remain "uninhibited, robust, and wide-open." 376 U.S. at 270. In *New York Times*, the Court addressed the scienter component of the equation so as to lessen the chill created by the intimidating threat of large libel judgments. "A rule compelling the critic of official conduct to guarantee the truth of all . . . factual assertions . . . on pain of libel judgments virtually unlimited in amount" creates an intolerable degree of self-censorship, *id.* at 279; so too does a rule compelling booksellers and others to guarantee the non-obscenity of all their wares, on pain of limitless RICO forfeiture judgments. The resulting "pall of fear and timidity . . . is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

The facts of this case, and the equally egregious outcome of the first federal RICO/obscenity prosecution in *United States v. Pryba*, demonstrate that the *in terrorem* effect of this and other RICO statutes predicated upon obscenity is no idle, hypothetical threat to the exercise of First Amendment rights and the circulation of protected mtaerials. In *Pryba*, 674 F.Supp. 15044 (E.D.Va. 1981), the trial court upheld the constitutionality of the federal criminal RICO statute as applied to obscenity, concluding

as did the Indiana Supreme Court that the statute simply did not implicate the First Amendment at all, and that "whatever chilling effect [the RICO forfeiture provisions] may have is legitimate and intended." 674 F.Supp. at 1513. The ensuing forfeiture order,[36] like the forfeitures sought in this case, authorized the government to confiscate the entire assets of five communicative businesses, including "the assets of three shops where customers could rent a variety of videocassettes, everything from family fare like the film 'Star Wars' to sexually-explicit tapes," the *New York Times* reported.[37]

This current wave of RICO/obscenity prosecutions and civil forfeiture actions sends an unmistakable message to any bookstore, periodical, video store, or theater which would make so bold as to disseminate *any* materials dealing candidly with sexuality. Despite the enormous popularity of sexually-oriented films, and despite the fact that a great deal of such entertainment is clearly non-obscene and protected by the First Amendment, the obscenity application of RICO statutes represents highly politicized pressure aimed at curtailing all erotic expression, including

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36 The *Pryba* forfeiture order is reproduced as Appendix B to this Brief, App. 9-13.

37 As the *Times* further noted, "the Justice Department plans to seek a series of racketeering indictments this year designed to seize tens of millions of dollars from the distribution and sale of sexually-explicit material." "U.S. Planning Major Drive Against Big Pornographers," January 12, 1988.

protected materials.[38] The clear warning to all communicative businesses is to "steer far wider of the unlawful zone," by self-censoring any materials which could possibly trigger the confiscatory sanctions of the RICO Act.

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CONCLUSION

As applied to obscenity, Indiana's civil RICO statute is among the most severe threats to protected expression ever to come before this Court for review. Petitioner respectfully submits that this Court should strike the entire statute as facially unconstitutional in its application to obscenity and should reverse the judgment of the Indiana Supreme Court.

DATED: May 12, 1988

Respectfully submitted,

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Of Counsel

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[38] The *Pryba* court, as noted above, frankly recognized that the RICO forfeiture provisions are "intended" to have a chilling effect. 674 F.Supp. at 1513. Likewise the Meese Commission candidly acknowledged the unconstitutional purpose to effect a prior restraint underlying these statutes: "RICO provides an effective means to substantially eliminate obscenity businesses." Attorney General's Commission on Pornography, *Final Report* at p. 498 (July 1986).

APPENDIX A
INDIANA CIVIL AND CRIMINAL RICO STATUTES

CHAPTER 30.5
CIVIL REMEDIES FOR RACKETEERING ACTIVITY

34-4-30.5-1. *Definitions.*—As used in this chapter:

"Aggrieved person" means a person who has an interest in real property or in an enterprise that:

(1) Is the object of corrupt business influence (IC 35-45-6-2); or

(2) Has suffered damages or harm as a result of corrupt business influence (IC 35-45-6-2).

"Enterprise" means the same as the definition of that term found in IC 35-45-6-1. [IC 34-4-30.5-1, as added by Acts 1980, P.L. 199, § 1; P.L.308-1895, § 1.]

34-4-30.5-2. *Action by prosecuting attorney to enjoin violation of IC* 35-45-6-2*—Orders.*—The prosecuting attorney in a county in which the violation occurs, may bring an action to enjoin a violation of IC 35-45-6-2. An action under this section may be brought in any circuit or superior court in a county in which the violation occurs. If the court finds by a preponderance of the evidence that a violation of IC 35-45-6-2 has occurred, it may:

(1) Order a defendant to divest himself of any interest in any enterprise or real property;

(2) Impose reasonable restrictions upon the future activities or investments of a defendant, including prohibiting a defendant from engaging in the same type of endeavor as the enterprise in which he was engaged in violation of IC 35-45-6-2;

(3) Order the dissolution or reorganization of any enterprise;

(4) Order the suspension or revocation of a license, permit, or prior approval granted to any enterprise by any agency of the state;

(5) Order the forfeiture of the charter of a corporation organized under the laws of Indiana, or the revocation of a certificate authorizing a foreign corporation to conduct business within the state, upon finding that the board of directors or a managerial agent acting on behalf of the corporation, in conducting the affairs of the corporation, has authorized or engaged in conduct in violation of IC 35-45-6-2 and that, for the prevention of future criminal activity, the public interest requires the charter of the corporation forfeited and the corporation dissolved or the certificate revoked; and

(6) Make any other order or judgment that the court considers appropriate.

In any order or judgment made by the court under this section, the judge shall make due provision for the rights of innocent persons. [IC 34-4-30.5-2, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-3. *Action by prosecuting attorney for forfeiture of property—Orders.*—(a) The prosecuting attorney in a county in which any of the property is located, may bring an action for the forfeiture of any property used in the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2. An action for forfeiture may be brought in any circuit or superior court in a county in which any of the property is located. Upon a showing by a preponderance of the evidence that the property in question was used in

the course of, intended for use in the course of, derived from, or realized through, conduct in violation of IC 35-45-6-2, the court shall order the property forfeited to the state, and shall specify the manner of disposition of the property including the manner of disposition if the property is not transferable for value. The court shall order forfeitures and dispositions under this section with due provision for the rights of innocent persons.

(b) When an action is filed under subsection (a), the prosecutor may move for an order to have property subject to forfeiture seized by a law enforcement agency. The judge shall issue such an order upon a showing of probable cause to believe that a violation of IC 35-45-6-2 involving the property in question has occurred. [IC 34-4-30.5-3, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-4. *Seizure of property by law enforcement officer—Seizure without court order—Disposition pending forfeiture and final disposition—Return to owner.*—(a) Property subject to forfeiture under this chapter shall be seized by a law enforcement officer upon court order. Seizure may be made without court order only if:

(1) The seizure is incident to a lawful arrest or search, or to an inspection under an administrative inspection warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter.

(b) When property is seized under subsection (a), pending forfeiture and final disposition, the law enforcement officer making the seizure may:

(1) Place the property under seal;

(2) Remove the property to a place designated by the court; or

(3) Require another agency authorized by law to take custody of the property and remove it to an appropriate location.

(c) Property seized under subsection (a) is not subject to [replevin], but is considered to be in the custody of the law enforcement officer making the seizure, subject only to order of the court. However, if a seizure of property is made in accordance with subsection (a), the prosecuting attorney shall promptly bring an action for forfeiture under section 3 [34-4-30.5-3] of this chapter. If an action is not filed within one hundred eighty [180] days after the date of the seizure, the law enforcement agency whose officer made the seizure shall return the property to its owner. [IC 34-4-30.5-4, as added by Acts 1980, P.L. 199, § 1.]

34-4-30.5-5. *Actions by aggrieved person.*—(a) An aggrieved person may bring an action for injunctive relief from corrupt business influence in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located. If the court finds, through a preponderance of the evidence, that the aggrieved person is suffering from corrupt business influence, it shall make an appropriate order for injunctive relief. This order must be made in accordance with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that a showing of special or irreparable damage to the aggrieved person is not required. The court may order injunctive relief only after the execution of a bond by the aggrieved person for an injunction improvidently granted, in an amount established by the court. In addition, the court may order a temporary restraining order or a preliminary injunction, but only after a showing of immediate danger of significant loss or damage to the aggrieved person.

(b) An aggrieved person may bring an action against a person who has violated IC 35-45-6-2 in a circuit or superior court in the county of the aggrieved person's residence, or in a county where any of the affected real property or the affected enterprise is located, for damages suffered as a result of corrupt business influence. Upon a showing by a preponderance of the evidence that the aggrieved person has been damaged by corrupt business influence, the court shall order the person causing the damage through a violation of IC 35-45-6-2 to pay to the aggrieved person:

(1) An amount equal to three (3) times his actual damages;

(2) The costs of the action;

(3) A reasonable attorney's fee; and

(4) Any punitive damages awarded by the court and allowable under law.

(c) The defendant and the aggrieved person are entitled to a trial by jury in an action brought under this section.

(d) An aggrieved person has a right or claim to forfeited property or to the proceeds derived from forfeited property superior to any right or claim the state has in the same property or proceeds.

(e) If the state is an aggrieved person, the attorney general has concurrent jurisdiction with the prosecuting attorney to bring an action under this section. [IC 34-4-30.5-5, as added by Acts 1980, P.L. 199, § 1; P.L. 308-1985, § 2.]

34-4-30.5-6. *Collateral estoppel.*—In any action brought under this chapter, the principle of collateral estoppel operates to bar relitigation of the issues previously determined in a criminal proceeding under IC 35-45-6-2. [IC 34-4-30.5-6, as added by Acts 1980, P.L. 199, § 1.]

CHAPTER 6

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

(CRIMINAL RICO STATUTE)

35-45-6-1. *Definitions.*—As used in this chapter:

"Documentary material" means any document, drawing, photograph, recording, or other tangible item containing compiled data from which information can be obtained or can be translated into a usable form.

"Enterprise" means a:

(1) Sole proprietorship, corporation, partnership, business trust, or governmental entity; or

(2) Union, association, or group, whether a legal entity or merely associated in fact.

"Pattern of racketeering activity" means engaging in at least two [2] incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five [5] years after a prior incident of racketeering activity.

"Racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation, of a provision of IC 23-2-1, or of a rule or order issued under IC 23-2-1; a violation of IC 35-47; a violation of IC 35-49-3; murder (IC 35-42-1-1); battery as a class C felony (IC 35-42-2-1); kidnapping (IC 35-42-3-2); child exploitation (IC 35-42-4-4); robbery (IC 35-42-5-1); arson (IC 35-43-1-1); burglary (IC 35-43-2-1); theft (IC 35-43-4-2); receiving stolen property (IC 35-43-4-2); forgery (IC 35-43-5-2); fraud (IC 35-43-5-4); bribery (IC 35-44-1-1); offical misconduct (IC 35-44-1-2); conflict of interest (IC 35-44-1-3); perjury (IC 35-44-2-1); tampering (IC 35-44-3-4); intimidation (IC 35-45-2-1); promoting prostitution (IC 35-45-4-4); promoting professional gambling (IC 35-45-5-4); dealing in cocaine or a narcotic drug (IC 35-48-4-1); dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2); dealing in a schedule IV controlled substance (IC 35-48-4-3); dealing in a schedule V controlled substance (IC 35-48-4-4); or dealing in marijuana, hash oil, or hashish (IC 35-48-4-10). [IC 35-45-6-1, as added by Acts 1980, P.L. 199, § 2; P.L.190-1984, § 1.]

35-45-6-2. *Corrupt business influence—Penalty.*—(a) A person:

(1) Who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

(2) Who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

(3) Who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity; commits corrupt business influence, a Class C felony. [IC 35-45-6-2, as added by Acts 1980, P.L. 199, § 2.]

APPENDIX B

ORDER OF FORFEITURE IN United States v. Pryba, E.D.Va. Crim. No. 87-00208-A ENTERED NOV. 18, 1987.

IN THE UNITED STATES DISTRICT COURT
FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	Criminal
v.	)	No. 87-00208-A
	)	
DENNIS E. PRYBA,	)	(Filed November
BARBARA A. PRYBA,	)	18, 1987)
JENNIFER C. WILLIAMS, and	)	
EDUCATIONAL BOOKS, INC.	)	

ORDER OF FORFEITURE

WHEREAS, in the Indictment, in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendants Dennis E. Pryba and Barbara A. Pryba (hereinafter referred to as the "defendants") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on November 10, 1987, a jury found the defendants guilty of 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on November 18, 1987, the same jury found that the defendants have certain interests in properties listed below which afforded them a source of influence over the enterprise in violation of 18 U.S.C. § 1963(a).

NOW THEREFORE IT IS ORDERED that the following properties are forfeited to the United States of America:

1. A parcel of property commonly known as 8411 Old Marlboro Pike, Unit 15, Upper Marlboro, Maryland, part of the Penn Belt Industrial Condominium complex; purchased in the names of Dennis and Barbara Pryba on or about February 28, 1983 and recorded in the record office of Prince George's County, Maryland, in Deed Book 5652, Page 211.
2. All shares of stock of B & D Corporation.
3. All shares of stock of Educational Books.
4. All shares of stock of Marlboro News, Inc.
5. All shares of stock of Home Video Sales, Inc.
6. All shares of stock of Video Shop, Ltd.
7. All corporate assets of B & D Corporation, located at 8411 Old Marlboro Pike, Upper Marlboro, Maryland, including, but not limited to, inventory, United States Currency, bank accounts (including Citizens Bank & Trust account No. 037-0341 and National Bank of Maryland account No. 620-2435-8), machinery, equipment, coin boxes, furniture, fixtures, motor vehicles (including a 1981 Audi VIN No. WAUHC0438BN 03154), and all shares of stock in Educational Books, Inc., Marlboro News, Inc., and Home Video Sales.
8. All corporate assets of Educational Books, Inc., located at 9158 Richmond Highway, Ft. Belvoir, Virginia, including, but not limited to, inventory, United States Currency, bank accounts (including 1st American Bank of Virginia account No. 60055123), coin boxes, cash registers, movie machines, and fixtures.
9. All corporate assets of Marlboro News, Inc., located at 7609 Marlboro Pike, Forrestville, Maryland, and 7425 Annapolis Road, Hyattsville, Maryland, including but not limited to, inventory, United States Currency,

bank accounts (including Citizens Bank & Trust account no. 0397258 and Sovran Bank account No. 46-05290-3), furniture, fixtures, machinery, equipment, cash registers and projectors.

10. All corporate assets of Home Video Sales, Inc., located at 8411 Old Marlboro Pike, Upper Marlboro, Maryland, including, but not limited to, United States Currency, bank accounts (including 1st National Bank of Maryland account No. 6215279-8), video machines, copy machine, vehicles (including a 1982 BMW 3201 VIN No. WBAAG4303C8069688), and all shares of stock of Video Shop, Ltd.
11. All corporate assets of Video Shop, Ltd. which corporate address is 8411 Old Marlboro Pike, Upper Marlboro, Maryland, (d/b/a Video Rental Centers at the below-listed locations: including, but not limited to, video tape cassettes, United States Currency, bank accounts (including Maryland National Bank account No. 512012386, United Virginia Bank account No. 080-04-978, and First Virginia Bank account No. 0774-0344), computers, safe, vehicles (including a 1986 Chevrolet Astro Van VIN No. 1GCDM15206B118910, a 1985 Chevrolet Blazer VIN No. 1G8CT18B4F0210345, and a 1986 Chevrolet Sprint VIN No. JG1MR6852-GK806925).

    (a) 804 Rockville Pike
    Rockville, Md.

    (b) 10288 Festival Lane
    Manassas, Va.

    (c) 6193 Livingston Rd.
    Oxon Hill, Maryland

    (d) 9156 Richmond Hwy.
    Ft. Velvoir, Va.

    (e) 8328 Richmond Hwy.
    Alexandria, Va.

    (f) 13711-A Jefferson Davis Hwy.
    Woodbridge, Va.

(g) 277 S. Van Dorn
Van Dorn Plaza
Alexandria, Va.

(h) 3525 S. Jefferson St.
Leesburg Pike Plaza
Bailey's Crossroads, Va.

(i) 13748 Smoketown Road
Dale City, Va.

IT IS FURTHER ORDERED that the Attorney General is authorized to seize the property and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, and additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States

shall have clear title to the property and may warrant good title to any subsequent purchaser or transferee.

Dated: 11/18/87

/s/ T. S. Ellis, III
UNITED STATES
DISTRICT JUDGE

By: /s/ Renee Spivey
Deputy Clerk